United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-6191

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

B

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellee-Appellant,

and

JOSEPHINE McGEE,

Plaintiff-Intervenor-Appellee-Appellant,

-against-

KALLIR, PHILIPS, ROSS, INCORPORATED,

Defendant-Appellant-Appellee.

ON APPEAL FROM A FINAL ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR KALLIR, PHILIPS, ROSS, INCORPORATED AS APPELLANT--CROSS-APPELLEE

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UNITED STATES COURT OF APPEALS
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Nos. 76-6191, 77-6039, 77-6041

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PRELIMINARY STATEMENT

The opinion of the district court on liability and damages is reported in 401 F. Supp. 66 (Supp. A 332-351) and 420 F. Supp. 919 (A 233-252), respectively. On this appeal Kallir, Philips, Ross, Incorporated (KPR) seeks to overturn the lower court's finding of retaliation or alternatively to reduce the amount of back pay awarded to McGee. Plaintiffs EEOC and McGee also cross-appeal the district court's refusal

to grant reinstatement and the court's deduction of unemployment compensation from McGee's back pay award.

This brief, on behalf of KPR, is in part, submitted in opposition to plaintiff's cross-appeal. The facts of this case have been amply and fairly presented by both plaintiff and defendant in the briefs previously filed with this Court. Therefore, to avoid redundancy defendant KPR has dispensed with a "statement of facts" and respectfully refers this Court to its original brief if there is a need or desire to review, once again, the events leading up to the controversy at bar.

Defendant contends that the refusal to order McGee's reinstatement was not an abuse of the trial court's discretion.* The lower court correctly considered the absolute necessity that there exist a bond of trust and confidence between KPR and an executive employee such as McGee, and that such bond has been irreparably damaged in the case at bar. The re-hiring of McGee would, in all likelihood, upset the delicate balance between KPR and its clients and would prove to be an intolerable burden on both defendant and plaintiff.

With regard to the deduction of unemployment insurance, this Court must follow the Second Circuit cases that hold unequivocally that such deduction is not an abuse of the district court's discretion in fashioning Title VII relief.**

Finally, defendant KPR has taken the opportunity to counter those arguments posited by plaintiffs concerning retaliation and back pay, and to distinguish the cases relied upon by both McGee and the EEOC.***

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*See Point III(b), supra, at 29.
**See Point III(a), supra, at 28.
***See Points I, II, supra, at 5, 19.

ISSUES RAISED BY APPELLANT

1. Whether the district court's finding that defendant violated Title VII by its discharge of Ms. McGee was erroneous in that it was against the weight of the evidence and was reached by the inconsistent and incorrect application of legal principles.

2. Whether the district court's award of back pay was against the weight of the evidence that Ms. McGee's attempts to seek alternative employment were not reasonable and diligent.

3. Whether the district court's award of one year's prospective salary was an abuse of discretion.

ISSUE RAISED BY CROSS-APPELLANTS

Whether the district court's denial of reinstatement and its deduction of unemployment insurance benefits was not an abuse of its discretion.

I. NOTWITHSTANDING THE PENDANCY OF HER SEX DISCRIMINATION CHARGE, MS. McGEE ACTED IN DEROGATION OF HER EMPLOYMENT RELATIONSHIP AND PRECIPITATED HER DISCHARGE THEREBY.

There can be no argument about the need for and benefits of Title VII of the Civil Rights Act ("Act"), 42 U.S.C. §2000e et seq. (1970), for redressing the evil of discriminatory employment practices. It has proven to be a vital and singular means of affording all employees equal opportunities under the law. Aggrieved employees certainly should be encouraged to file complaints pursuant to the provisions of the Act and to investigate and prosecute them to the extent necessary to rectify any discriminatory practices. Nevertheless, there are limits. No employee has the right to be so overzealous or indiscreet in the course of prosecuting a discrimination charge that he or she negligently or intentionally inflicts economic harm upon the employer or precariously exposes it to possible harm. No employee has the license to embark upon a unilaterally determined course of conduct in derogation of the established law governing employment relations, merely because a discrimination charge was filed. No employee can use the laudatory protections afforded by the Act as a weapon of coercion against which the employer is defenseless because managerial prerogatives are wrongly suspended. On the contrary,

the seemingly conflicting interests of both parties must be reconciled. Proper application of the Act mandates a balancing of these interests. EEOC v. Operating Engineers Local 14, Civil No. 76-6150 at 2487 (2d Cir., March 21, 1977).

Under the common law, an employee is under a duty of loyalty to her employer. H.B. Fuller Co. v. Hagen, 363 F. Supp. 1325, 1331 (W.D.N.Y. 1973). She is prohibited from acting inconsistently with the trust afforded her, and always must exercise the utmost good faith in the performance of her duties. Duane Jones Co. v. Burke, 306 N.Y. 172, 188, 117 N.E. 2d 237, 245 (1954); Micro Precision Corp. v. Brochi, 156 N.Y.S. 2d 501, 503 (Sup. Ct. 1956). The filing of a sex discrimination charge under Title VII does not suspend these obligations, nor does it immunize her from acts of disloyalty. See Hochstadt v. Worcester Foundation For Experimental Biology, 545 F. 2d 222, 233 (1st Cir. 1976). Ms. McGee was required to continue in her capacity as a senior account executive in a manner that best protected the interests of her employer, Kallir, Philips, Ross, Inc. (KPR). She was under a fiduciary duty to present KPR to its clients, such as Upjohn, in the finest light possible, and to refrain from conduct detrimental to its interests. Edmond Weil, Inc. v. Pintow, 20 App. Div. 2d 537, 245 N.Y.S. 2d 53, 55 (1st dep't 1963)(per curiam). She could not unilater-

ally proceed upon a course of conduct which could result in her benefit, i.e. higher pay, through the destruction of KPR's business. See Duane Jones Co. v. Burke, supra, at 189, 117 N.E. 2d at 245. The rights afforded her by Title VII were to serve as a shield against the discrimination she alleged, not the fiduciary duties imposed upon her by law.

It has been said that "no man [or woman] can serve two masters with equal fidelity when rival interests come into existence." Elco Shoe Manufacturers v. Sisk, 260 N.Y. 100, 103, 183 N.E. 191, 192 (1932). As time passed, it became evident that Ms. McGee was in the service of a second master -- her pending discrimination charge, and it was in such over-zealous service that she overstepped the bounds of employee loyalty and precipitated her own discharge. She should not be permitted to use Title VII as a cloak behind which to hide from the unavoidable consequences of her own voluntary acts. Cf. Trans World Airl , Inc. v. Beaty, 402 F. Supp. 652, 658 (S.D.N.Y. 1975). Nor can the protections afforded her by Title VII be applied blindly so as to hamstring KPR from taking lawful measures in protecting itself from her.*

*In this regard, it should be noted that KPR first attempted to protect itself through the New York City Commission on Human Rights (NYCCHR) but was told by the latter's representative, Ms. Morales, that the agency was powerless to impose sanctions upon employees.

"Certainly, a corporation is entitled to protect itself from the consequences of a division within its ranks." Rudman v. Cowles Communications, Inc., 35 App. Div. 2d 213, 216, 315 N.Y.S. 2d 409, 412, (1st dep't 1970), modified, 30 N.Y. 2d 1, 280 N.E. 2d 867, 330 N.Y.S. 2d 33 (1972).

In cases where an employer has been held to have illegally retaliated against its employee for having filed a complaint under Title VII, there is usually evidence of a deteriorating shift in its treatment of the employee. See, e.g., Hyland v. Kenner Products Co., 13 FEP Cases 1309, 1319 (S.D. Oh. 1976). In sharp contrast, there was no change in KPR's treatment of Ms. McGee after she filed her complaint--something which she candidly admitted at trial (App. A-59, 60). In fact, her responsibilities increased. The critical prostaglandin presentation was considered an excellent, albeit coincidental, opportunity for Ms. McGee to demonstrate to the annual salary committee that her abilities merited more pay. In fact, as Ms. McGee testified she was critical to this presentation as she was the only one to have done at KPR's direction abortion clinic research.

The only change in attitude resulting from the discrimination complaint happened to be that of Ms. McGee. The pressure of her complaint influenced her conduct and it clearly deteriorated in but a three month span as she went from an aspiring advertising executive enjoying a meteoric career to a disgruntled source of constant disruption and potential harm. Thus, after KPR became aware of the solicitation of the Korzilius letter it became painfully clear that she had breached her fiduciary role.

At that point, KPR had no alternative but to act, as it did -- swiftly and unequivocally. Its decision to suspend and later discharge her were based upon sound economic and business reasons, and had nothing to do with her discrimination case.* Contra Johnson v. Lillie Rubin Affiliates, Inc., 5 FEP Cases 547 (M.D. Tenn. 1973) (sole reason for discharge was employee's complaint to the NAACP). Can this Court affirm the decision of the lower court that KPR should have powerlessly sat back, await more indiscretions and lapses of judgment, and only act upon the actual debilitating loss of its second largest client? The implication of Judge Weinfeld's decision leaves little doubt that only at this point could KPR have dismissed Ms. McGee. Had KPR followed such a rule, could the five or more KPR employees whose layoffs would have resulted from such a protracted response take solace that their sudden unemployment was in furtherance of a misplaced Title VII claim?

The district court found that Ms. McGee's solicitation of the job description letter from Ms. Korzilius of Upjohn Co. "was so strongly resented that it was a substantial cause of plaintiff's suspension." EEOC v. Kallir, Philips, Ross, Inc.,

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*KPR, with an excellent record of providing women with outstanding executive opportunities, had little to fear from Ms. McGee's complaint. This fact is borne out in the EEOC's finding that the evidence was insufficient to sustain a charge of sexual discrimination, and the fact that her brains and talent brought her a meteoric rise within the company regardless of her sex.

401 F. Supp. 66, 71 (S.D.N.Y. 1975). KPR introduced additional evidence that this incident actually culminated what was in its evaluation a line of disruptive and ever-worsening conduct, the most significant being her disruptive behavior at the critical, first presentation of the prostaglandin advertising campaign,* evidence of which remains unrebutted by Ms. McGee. The court, however, dismissed these reasons, respectively, as "lacking in substance", id., and "sheer pretext".** Id. at 72.

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*Prostaglandin promised to be a revolutionary approach to combating disease by impairing the intracellular communication between the nuclei and cytoplasm of bacteria. The agency which would have conducted its advertising stood to profit handsomely. However, for the first time, KPR found itself competing with another agency for this new business. It was therefore imperative that all its employees do their utmost to convince Upjohn that KPR could provide the best campaign.

**The trial court summarily dismissed evidence of Ms. McGee's disruptive conduct during the first prostaglandin presentation as "sheer pretext advanced for the first time at the trial. . . ." EEOC v. Kallir, Philips, Ross, Inc., supra, at 72. The court found it significant that no mention of it was made at the NYCCHR fact finding conference. Such reasoning is in conflict with implications that can be drawn from the record. Unaware of the Korzilius letter, KPR representatives attended that conference with no intent to discharge Ms. McGee. Certainly they were annoyed with her conduct, but they felt it would subside after her case was resolved. Therefore KPR's attorney prepared his case solely on the issue of parity. It would have needlessly clouded that sole issue to introduce collateral evidence, such as the prostaglandin presentation. Nevertheless, Judge Weinfeld faults KPR for not having done so, and readily finds "pretext" where a reasonable evaluation would have found proper evidentiary discretion.

These erroneous conclusions were reached by the court on account of its failure to consider the entire record and by the inconsistent application of legal principles.

Specifically, the court failed to recognize the volatile nature of the advertising industry caused by the fragile, vulnerable client-agency relationship which permeates the entire field. Failure to consider the entire record requires, at the very least, a remand to the court on the issue of the adverse business implications of Ms. McGee's conduct. It also failed to appreciate the vital role played by a senior account executive, as Ms. McGee. The entire relationship between KPR and Upjohn, its second largest client, was focused upon one interface. Ms. McGee was routinely representing the agency through her contact with Upjohn's product manager, Ms. Korzilius. The account representative is, in effect, the salesperson of the agency. Any disturbances along this line of communication could destroy the relationship. It was immaterial whether or not Ms. Korzilius would keep the knowledge of the pending discrimination case confidential. Because of her pivotal role in the inter-corporate relationship, she was the very person whom Ms. McGee should never have informed about her internal problems with KPR.

It was Ms. McGee's admitted duty (App. A-55), always to convey to Upjohn through Ms. Korzilius the best possible image of KPR. Was it therefore unnatural or unreasonable for KPR to assume that Ms. Korzilius, in a feeling of solidarity, would be sympathetic to Ms. McGee's discrimination charges and thereafter view KPR in a somewhat dimmed light? Yet this was but one perceived effect. Had Ms. McGee's discrimination charge not been dismissed by the EEOC, it was likely that Ms. Korzilius would have become involved in the litigation while still an employee of Upjohn. Was it unreasonable to believe that Upjohn would have been annoyed at the involvement of its personnel in an internal dispute at its advertising agency? Defendant submits that it was not, for it then properly assessed that Upjohn could leave it for an agency which offered comparable services without the collateral entanglements. There are other subtleties as well. Had Ms. Korzilius refused to provide the letter, there could have been continued feelings between her and Ms. McGee of guilt and resentment respectively, with consequent effects upon the relationship between the client and agency. Furthermore, had KPR allowed Ms. McGee to get away with contacting a client, it could not thereafter prevent other female and minority employees from pursuing the same

course of conduct. Ms. McGee's secretary or any other person connected with the Upjohn account could claim a similar right to contact and harass the client. At some point, Upjohn would have to become annoyed at the reversal of its role, as suddenly the client was finding itself serving the agency. Undoubtedly, the potential threat raised by any endorsement of such actions had to be avoided.

While it is true Ms. McGee's conduct did not yet rise to the extreme level of disruptiveness evidenced in other cases, see, e.g., EEOC v. Del Rio National Bank, 12 FEP Cases 1668 (W.D. Tex. 1975) and was instead more subtle and sophisticated, it nevertheless posed a serious threat to KPR's economic health. One is reminded of the immortal words of Mercutio in "Romeo and Juliet" as he describes the small wound inflicted by Tybalt:

> No, 'tis not so deep as a well,
> nor wide as a church door, but 'tis
> enough, 'twill serve.

The Complete Works of William Shakespeare at 920 (P. Alexander ed. 1971).

The district court made much of Ms. McGee's "circumspect" attempt to keep the matter confidential between her and Ms. Korzilius, and held that she acted in good faith, refusing

to consider the fact that the actual result was quite the opposite. (App. A-115). Oddly enough, the court refused to apply the same good faith test to KPR's evaluation of the potential threat to the Upjohn account, and instead curiously focused on the actual result -- no effect on the account -- in reaching its decision that the defendant overreacted. Such inconsistent application of legal principles requires reversal.

The trial court's inquiry with regard to the Korzilius letter should have been directed solely to KPR's subjective belief that it was acting in good faith in its assessment of potential threats to its economic viability. See Sek v. Bethlehem Steel Corp., 421 F. Supp. 983, 993 (E.D. Pa. 1976). The plaintiff, EEOC, incorrectly cites NLRB v. Burnup & Sims, Inc., 379 U.S. 21, 23 (1964), as analagous authority for its contention that the employer's good faith is irrelevant. A careful analysis of Burnup, however, reveals EEOC's confusion. There the Court was only speaking of an employer's mistaken belief that the employee had committed the act upon which it based its decision to terminate him. In the case at bar, there is no uncertainty that Ms. McGee solicited the Korzilius letter and acted improperly at the first prostaglandin presentation. Under such circumstances, reliance upon Burnup is entirely misplaced. NLRB v. Community Motor Bus Co., 439 F. 2d 965, 968 (4th Cir. 1971).

Besides ignoring defendant's good faith, the lower court refused to balance the interests of both parties in reaching its decision. By so doing, it unwittingly broadened the range of employees' rights under Title VII far beyond those provided by the National Labor Relations Act (NLRA), which is supposed to serve as a model for Title VII adjudications. See Albermarle Paper Co. v. Moody, 422 U.S. 405, 419 n. 11 (1975).

> [T]he competing interests that weigh against granting employees carte blanche protection are the same in the NLRA and Title VII contexts: the employer's right to run his business must be balanced against the rights of the employee to express his grievances and promote his own welfare.

Hochstadt v. Worcester Foundation For Experimental Biology, supra, at 233. Keeping this in mind, one finds the Seventh Circuit's decision in NLRB v. Knuth Brothers, Inc., 537 F. 2d 950 (1976), most instructive.

The issue in Knuth was whether the defendant, a subcontractor, had violated §8(a) of the NLRA, 29 U.S.C. §158(a) (1970), by discharging its employee for having contacted a dealer's customer in an attempt to verify union propaganda.

The National Labor Relations Board (NLRB) held that the employee was engaged in protected activities and consequently that the discharge was in violation of §8(a) of the NLRA.

The Seventh Circuit, however, reversed, finding under the much narrower standard of review afforded administrative appeals that the Board's decision was not supported by substantial evidence because it failed "to recognize the impact of [the dealer's] anger and the disastrous effect the revelation could have had if [the customer] had not known the work was subcontracted." Id. at 955 (emphasis supplied). The court goes on to say that the employee's act was not protected because he ventured far beyond the scope of his duties, for he had no authority to contact the customer. Id. Similarly, Ms. McGee lacked authority to contact Upjohn with respect to matters unrelated to her duties as senior account executive. The court also held that, notwithstanding the employees avowed mistrust of the defendant, that he still should have talked to his employer first so that he could learn the harm that his intended act could have caused. Id. at 956. Similarly, Ms. McGee, instead of unilaterally deciding to contact Ms. Korzilius, should have first discussed her proposed course of action with one of KPR's executives.

As in Knuth, Ms. McGee's solicitation of the Korzilius letter was in "reckless disregard" of her employer's business interests. KPR had the right to expect its employees to use great care in dealing with its clients. "Failure to use such care was an act of disloyalty. . . ." Id. The demon-

strable erosion of the trust of her position constituted inadequate job performance which alone can stand as justifiable cause for her discharge. Her avowed purpose of prosecuting her complaint was insufficient to protect her from the consequences of her misconduct. She cannot claim immunity for acts for which KPR would ordinarily be entitled to discharge her (or any other employee) due to the fortuitous fact that she filed a discrimination charge. Cf. Sek v. Bethlehem Steel Corp., supra.

No employer can be required to stand by impotently while someone in Ms. McGee's position systematically destroys or by her conduct threatens to destroy its business, yet such a restraint has been imposed by the lower court's decision. The effect of its decision, if it is allowed to stand, will place all employers in a precarious position whenever one of their executive employees files a charge of real or imagined discrimination. Under the standard promulgated by Judge Weinfeld, the employer is at a complete disadvantage in its inability to protect its economic interests against the actions of a high level employee who abuses the trust afforded him or her as a result of his or her position in the course of investigating and prosecuting a claim under Title VII. Certainly, Title VII must place aggrieved employees on equal footing with their employers in order to combat discrimination. But

is it not going too far beyond the intent of Congress by suddenly placing the employer at a disadvantage? Such a result would be counterproductive to the Act's very goal of voluntary compliance. Knowledge of the suspension of their regular managerial prerogatives would lead to a "chilling effect" as many employers would, perhaps even unconsciously, shy away from placing in a key position any female or minority worker who could threaten vital business interests upon a unilateral assessment that they were suffering the effects of job discrimination.

Thus it is the task of this Court to decide whether employers are to be penalized, without due process of law, merely because discrimination is alleged. It must decide whether, under the guise of protected activities, an employee can ignore his or her fiduciary duties, cause managerial prerogatives to be suspended, and threaten to harm the employer's interests. Finally, the Court must assess whether or not the district court's refusal to weigh compelling business interests will indeed "chill" voluntary compliance with Title VII.

II. THE AMOUNT OF BACK PAY AWARD WAS ERRONEOUS BECAUSE THE WEIGHT OF THE EVIDENCE INDICATES THAT PLAINTIFF FAILED TO REASONABLY MITIGATE HER DAMAGES AND THE AWARD OF FRONT PAY WAS ERRONEOUS BECAUSE IT IS A LEGAL REMEDY THAT SEEKS TO COMPENSATE McGEE AND PUNISH DEFENDANT.

Before turning specifically to the issues raised by plaintiff on her cross-appeal, defendant feels that it is necessary to comment briefly on the propositions already set forth in its original brief with regard to the amount of back pay awarded to Ms. McGee by the district court. In response to defendant's contention that McGee failed to take reasonably diligent steps to find alternate employment during the interim period plaintiff states that "[d]efendant attempts to discredit the reasonableness of McGee's efforts by pointing to several other actions she could have taken." (EEOC brief at 47). The plaintiff then quotes from the court below:

> defendant's burden of proving a lack of diligence is not satisfied merely by showing that there were other actions the plaintiff could have taken in pursuit of employment.

Id. at 47.

Lest there be any confusion, defendant re-emphasizes that it supports the district court's statement that it is not

enough to point to other actions McGee could have taken in order to sustain its burden of showing plaintiff's lack of diligence in seeking alternate employment. However, in order to prove that plaintiff's course of conduct was so deficient as to constitute an unreasonable failure to find work, defendant must necessarily compare those actions actually taken by Ms. McGee with the actions that individuals in her position could have reasonably been expected to follow.

It is impossible to discuss plaintiff's conduct in a vacuum. The only means of sustaining the burden of proving unreasonableness is by a careful weighing of the actions taken or not taken by plaintiff, with special attention directed towards the pervasive issue of whether or not a reasonable person diligently seeking alternate employment would have taken the actions and used the techniques evidenced by Ms. McGee in the instant case. It is the failure by the district court to afford equal weight to the evidence in the record concerning McGee's inactivity and omissions and the evidence of the usual and accepted method used to find employment in the specialized and limited field of ethical drug advertising that requires reversal of the finding that plaintiff's efforts were reasonable and diligent. If the lower court had properly applied the facts and evidence to the legal standard, a finding of unreasonable efforts would have surfaced. The finding to the contrary, therefore, is clearly against the weight of the evidence and

must be reversed.

Without belaboring the argument already posited by defendant in its original brief, a few facts must be restated relative to plaintiff's lack of diligence. Foremost is the glaring failure by McGee to register with any employment agency actively specializing in the placement of individuals in ethical drug advertising firms, the area of McGee's expertise (admitted by EEOC in brief at 45).* In fact, plaintiff failed to register with <u>any</u> employment agency specializing in placing account management people in advertising. The finding by the district court that plaintiff contacted eight employment agencies (A-246) is therefore highly misleading under the aforestated circumstances and does nothing to bolster McGee's contention of reasonableness. Employment agencies primarily involved in placing secretaries cannot reasonably compare with those agencies actively engaged and specializing in placement of individuals in the pharmaceutical and advertising fields.

Plaintiff McGee and the EEOC, as well as the district court, make much of the fact that during the interim period McGee attended monthly meetings of the Pharmaceutical Advertising

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*During the period in controversy there existed at least three well known employment agencies engaged solely in the placement of individuals in the pharmaceutical field. They were the Alan Kane Agency, New York Medical Exchange, and Sampson & Neill (Upper Montclair, New Jersey).

Club, (PAC).* While defendant does not take issue with the assertion that PAC is a gathering place for people in the ethical drug industry, defendant must raise this obvious question: did McGee, under all the circumstances, unreasonably rely upon PAC? KPR answers this query with a resounding yes.

It must be remembered that PAC meetings occurred a mere once a month (Supp. A 384). Thus the usefulness of PAC as a source of employment opportunities would necessarily be greatly limited between meetings. Additionally, one could reasonably expect that the thirty day interim between meetings would be put to more effective use by plaintiff in furtherance of her avowed goal to seek alternate employment. In this regard, and giving McGee every favorable inference, the plain truth is that during the two and a half year interim period, plaintiff contacted only nineteen potential employers, and of these only five were advertising agencies arguably within the pharmaceutical field!

Most importantly, the district court failed to consider another glaring omission on the part of McGee with regard

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*In this regard EEOC states that "[d]efendant's own personnel expert, Braunworth, conceded that attendance at PAC meetings is a standard practice in the industry for obtaining job leads." (EEOC brief at 43). This is misleading. When asked whether PAC meetings was a standard method to obtain jobs in the ethical drug advertising field, Mr. Braunworth actually replied: "I suppose they do, but not to my knowledge. I don't use it as an effective tool of recruiting." (Supp. A 399).

to PAC meetings; and that was that a reasonable person in plaintiff's situation would have ceased relying primarily on what proved to be a "dry" source and started to look elsewhere. McGee's basic assumption that PAC meetings would provide fruitful employment opportunities had to wear thin after the passage of time and her continued faith in this organization, although perhaps noble, must be deemed unreasonable. Taken in this light, McGee's failure to contact and register with those employment agencies specializing in placing people in the pharmaceutical field becomes even more blatantly unreasonable. To quote from plaintiff's brief: "It is difficult to conjure up any explanation for one's idleness for that length of time which would satisfy even the most understanding of prospective employers." (emphasis added) (McGee's brief at 39).

Other unreasonable omissions by plaintiff not given legally sufficient weight by the district court were (1) McGee's failure to use effectively the New York Times advertising section (A-184); (2) her failure to read and respond to materials peculiar to her specialized field, such as Advertising Age, Standard Rates, or "Red Book" (KPR brief at 41-42); (3) her failure to mail a reasonable number of resumes; and (4) her highly questionable conduct at the few interviews she did obtain (KPR brief at 39). If the entire record was given fair weight, the lower court would have had to conclude that McGee's efforts reflected a desire to remain unemployed and a victim of discrimination. The tone of her letters to the court (App-253, A-265,

A-271-72) indicates an overly developed sense of martyrdom. As a highly visible spokesperson for women's rights could McGee have consciously avoided alternate employment so as to exaggerate her "plight"?

Another aspect of this case that must be re-emphasized is the district court's erroneous award of back pay for the period of time in which McGee had, by her own admission, ceased all affirmative efforts to find employment. Plaintiffs EEOC and McGee merely state that the award for the period subsequent to September, 1975 was proper because McGee continued to be registered in certain general (as opposed to pharmaceutical) employment agencies. (EEOC brief at 49, McGee brief at 40). Both defendant's briefs as well as the court below do not refute the plain language of United States v. Wood, Wire and Metal Co., 328 F. Supp. 429, 443 (S.D.N.Y. 1971) holding that before an employer need show a lack of diligence, a plaintiff seeking back pay must "as a first step" prove a "sufficient investment of time and effort." (Emphasis added). Subsequent to September, McGee never took this "first step".

Also illustrative is the recent case of Rucker v. Essex International, Inc., 14 FEP Cases 403 (N.D. Indiana 1976). In that case a female discriminatee had at first taken reasonable steps to find alternate employment but then halted her efforts for six months. In denying back pay for the period of idleness the court stated:

> From July of 1972 until December of 1972, plaintiff made no formal application for employment. Nor could plaintiff recall making any specific inquiries for work during this period of time. The court finds that plaintiff failed to exercise reasonable diligence in seeking employment. Sprogis v. United Air Lines, Inc., 517 F. 2d 387 (7th Cir. 1975).

Id. at 413; see 121-129 Broadway Realty, Inc. v. New York State Division of Human Rights, 48 App. Div. 2d 975, 369 N.Y.S. 2d. 837 (3d dep't 1975) (mem.).

McGee's admitted inactivity subsequent to September, 1975 cannot be twisted so as to define a diligent and reasonable search for alternate employment, notwithstanding the poor job market, or McGee's state of mind. The finding to the contrary by the district court was clear error and must be reversed, for as it has been stated:

> It is one thing to grant retroactive or constructive seniority to discriminatees deterred from applying for jobs or promotions [cites omitted]. It is another thing to grant back pay to those who never applied for a job because they thought it was useless to do so.

Equal Employment Opportunity Commission v. Steamfitters Local 638, 542 F. 2d 579, (2d Cir. 1976), cert. denied 45 U.S.L.W. 3587 (U.S. Feb. 28, 1977).

One more issue that this Court must determine in this appeal is the award to Ms. McGee of one year's prospective salary, i.e. "front pay". Defendant vigorously contends that such award was an abuse of the trial court's discretion. Defendant has already addressed itself to the impossibility of adequate court supervision inherent in the award of front pay and the failure by the district court to issue proper safeguards to insure that defendant's rights are not prejudiced if McGee does, in fact, find suitable employment before the one year has elapsed. (KPR brief at 49-52).

Moreover, the award of front pay goes far beyond the remedial and equitable purposes of Title VII to make the discriminatee whole. See Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975). In effect, an award of front pay is comparable to future damages, and as such is a legal remedy. It is well-established that the relief afforded by Title VII is sounded squarely in equity. See Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists, 401 F. Supp. 1363 (S.D.N.Y. 1975). Thus, the award to McGee of a prospective year's salary is, in essence, a compensatory remedy and should not be sanctioned by this Court.

Furthermore, the district court's front pay award of $22,881.38 is punitive in nature. The district courts within this Circuit have consistently refused to award punitive damages in Title VII cases. See e.g. Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists, supra at 1368-69; Wooten v. N.Y. Telephone Co., 14 FEP Cases 351 (S.D.N.Y. 1976); Mills v.

Fox, 421 F. Supp. 519, 524 (E.D.N.Y. 1976). Additionally, after considering the legislative history of §706(g), one court concluded that Congress' objective in drafting §706(g) was to provide courts with a "wide panorama of equitable tools" so as to eliminate employment discrimination; not to "punish defendants by imposing upon them large money awards in the form of compensatory and punitive damages." Van Hoomissen v. Xerox Corp., 368 F. Supp. 829, 836 (N.D. Cal. 1973).

Thus, when the severe burden imposed upon KPR to pay $22,881.38 "over and above" the amount of back pay is considered with (1) the fact that McGee's original complaint of sex discrimination was summarily withdrawn by the EEOC itself; (2) that the one year's future salary remains enforceable against defendant regardless of whether McGee becomes employed during that year; and (3) that the future pay award represents almost 26% of the total judgment, it is clear that such award seeks to punish the defendant. This punitive damage award must not be permitted to stand as precedent in this Circuit.

III. THE REFUSAL TO GRANT REINSTATEMENT AND THE DEDUCTION OF UNEMPLOYMENT BENEFITS FROM THE BACKPAY AWARD WERE PROPER AND NOT AN ABUSE OF THE DISTRICT COURT'S DISCRETION.

Turning to those issues raised by plaintiff's cross-appeal with regard to the refusal of the district court to order McGee's reinstatement at KPR and the deduction of unemployment compensation from her award of back pay, it will be seen that both rulings are proper and must be upheld by this Court.

a. The Deduction of New York State Unemployment Payments From The Award Of Back Pay Was Proper.

Plaintiffs McGee and EEOC argue that the decision by the trial court to deduct unemployment payments was improper. However, it has recently been made clear that in the Second Circuit such deduction is not an abuse of the district court's discretion.

In Equal Employment Opportunity Commission v. Steamfitters Local 638, 542 F. 2d 579, 592, (2d Cir. 1976), cert. denied, 45 U.S.L.W. 3587 (U.S. Feb. 28, 1977) the court held that an award of back pay would be reduced by unemployment insurance, stating:

> As a matter of policy, however, we are inclined to agree with the Satty case [Satty v. Nashville Gas Co., 522 F. 2d 850 (6th Cir. 1975)] and the rulings in other circuits which have held it not an abuse of discretion to deduct sums received from collateral sources such as unemployment compensation. . . . We see no compelling reason for providing the injured party with double recovery for his last employment, no compelling reason of deterrence or retribution against the responsible party in this case; and we are not in the business of redistributing the wealth beyond the goal of making the victim of discrimination whole.*

This Court should follow its holding in EEOC v. Steamfitters Local 638, supra and reiterate that the law in the Second Circuit is that a deduction of unemployment payments is applicable to back pay awards and is not an abuse of discretion.

b. The Decision Not To Order The Reinstatement Of McGee Was Not Error Or An Abuse Of Discretion.

On their cross-appeal plaintiffs seek to overturn the trial court's ruling not to reinstate McGee. The major

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*In this regard any loans made to McGee during the interim period were double recovery if such loans were not to be paid back. Thus, the district court and magistrate should have fully examined the circumstances surrounding these loans and failure to do so was erroneous. EEOC's contention that defendant should be precluded from now raising this issue because of failure to raise it earlier (EEOC brief at 53) is without merit since the magistrate foreclosed inquiry into this area and counsel for defendant specifically excepted to the ruling (A-183).

Two salient facts in connection with the issue of loans were erroneously discounted by the district court. The first is that pursuant to the Internal Revenue Code a "discharge of indebtedness" is includable as gross income. See I.R.C. (1954)(as amended), §61(a)(12). Therefore, if there existed an understanding between McGee and any of the sources for the loans that she did not have to pay them back, the monies received by plaintiff should have been deducted from her back pay award. (continued)

thrust of plaintiff's argument revolves around the language found in Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975) wherein the Supreme Court re-emphasized the wide discretion to be given to district courts in fashioning Title VII relief. Defendant agrees that any consideration of remedies pursuant to §706(g) must begin with an examination of the Albermarle case, and that any award is, of course, discretionary. However Albermarle recognized that the discretionary choices left to a trial judge must be "guided by sound legal principles". Id. at 416. Defendant contends that the decision to deny reinstatement was based upon valid and reasonable criteria far outweighing any vindication of Ms. McGee's rights (EEOC brief at 57) and as such was not an abuse of the trial court's discretion.

Justice Weinfeld in refusing to order reinstatement stated:

> . . . in this case the job from which plaintiff was discharged required a close working relationship between plaintiff and top executives of defendant. It also involved frequent personal contact with defendant's clients, with plaintiff acting as defendant's representative. Lack of complete trust and confidence between plaintiff and defendant could lead to misunderstanding, misrepresentations and mistakes, and could seriously damage defendant's relationship with its clients.

(A-250).

(*cont'd) The second error is that the lower court refused to hear testimony relating to the fact that McGee's expenses for litigating her case were being gratuitously financed by several women's groups. Such testimony was pertinent to the question of plaintiff's good faith and her actual motivation in diligently seeking alternate employment.

This reasoning is entirely consistent with a denial of reinstatement. It takes into consideration the highly sensitive nature of the advertising business, the trust required in agency-client relationships, and the frequency and necessity of personal contact between KPR and its clients. Certainly the refusal to grant reinstatement after one considers the peculiar circumstances present in the instant case cannot be deemed so unreasonable as to be termed an abuse of discretion.

The criteria used by the district court are similar to those enunciated by the court in Combs v. Griffin Television, Inc., 13 FEP Cases 1454, 1459 (W.D. Oklahoma, 1976) wherein the plaintiff was not granted reinstatement. Plaintiff, Combs, had been a television anchorman and brought an action against the station based on discrimination after he had been discharged. Although awarding back pay relief, the court denied reinstatement, reasoning:

> In the context of his relationship with management, other air personalities and other employees, the evidence shows that a television anchorman, as a performing air personality, is indeed unique, unusual, or sensitive. Discord, tension, suspicion, antagonism and sensitivity among them would be productive of a very difficult employment environment. . . Such a situation would be uniquely detrimental and destructive to both Combs and KWTV. . . A court should avoid forcing such an employment relationship on either an employer or employee. . .

Id. at 1459-1460.

Similarly, the court refused to grant reinstatement in Hyland v. Kenner Products Co., 13 FEP Cases 1309 (S.D. Ohio 1976) articulating its reasons thusly:

> Plaintiff's work is in a specialized field . . . Unlike an unskilled worker, a person in an executive or management position must have the complete confidence of others in management. . . . If reinstated, plaintiff would find herself in the position of possessing confidential information but would not enjoy the trust and confidence of her superiors. In such a situation, a court will not order parties to enter into an employment relationship.

Id. at 1321-1322. See also Bach v. Friden Calculating Machine Co., 155 F. 2d 361 (6th Cir. 1946).

It must be re-emphasized that reinstatement as a remedy is not mandatory and that to grant or deny it is within the sound discretion of the trial court after a careful consideration of the particular facts of each case. See Albermarle Paper Co. v. Moody, supra. The burden of showing an abuse of that discretion is upon plaintiff. This she has failed to do. The district court's opinion with regard to its denial of reinstatement reflects a deliberate and considered decision to avoid unconscionable difficulties affecting both Ms. McGee and KPR and a sound judicious exercise of the broad and flexible discretion inherent in Title VII. The refusal to grant reinstatement to plaintiff was, therefore, totally proper and well

within the trial court's equitable powers. See Combs v. Griffin Television, Inc., supra.

Specifically, the case at bar evidences a situation wherein the mutual trust between KPR and McGee is forever obviated. It has been previously shown that advertising is an extremely sensitive business. During her employment at KPR, plaintiff was called upon to make major decisions relating to Upjohn, one of defendant's largest accounts. Any serious friction or mistrust between KPR and McGee would be communicated to others outside the confines of defendant's corporate structure including, but not limited to, Upjohn. In an industry where the development of good client relationships remains the most important factor in creating a successful enterprise, the re-hiring of a disgruntled employee such as Ms. McGee, would prove disastrous for KPR. There is a very real possibility that the rehiring of McGee would upset the delicate balance existing between KPR and its clients. As such, the district court's refusal to order McGee's reinstatement must be affirmed.

CONCLUSION

It is respectfully submitted by defendant that the decision of the lower court be reversed by this Court. In the event this Court deems that a remand is necessary, it is requested that the case be remanded on both issues of liability and damages, except to the extent that the order of the district court denying reinstatement and deducting unemployment insurance benefits be affirmed.

Dated: New York, New York
April 6, 1977

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief of Kallir, Philips, Ross, Incorporated as Appellant-Cross-Appellee have been mailed this day, April 6, 1977, postage prepaid, to the following counsel of record:

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